[ORAL ARGUMENT HELD ON JULY 12, 2019]

Nos. 19-5142

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD J. TRUMP, et al.,
Plaintiffs-Appellants,

v.

MAZARS USA, LLP,
Defendant-Appellee,

COMMITTEE ON OVERSIGHT AND REFORM
OF THE U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTRODUCTION

A congressional effort to compel production of the President's records raises significant separation-of-powers issues. The President occupies a "unique position in the constitutional scheme," and his special constitutional role requires both "restraint" and "respect" from Congress and the courts. *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 382, 385 (2004). That principle applies even where, as here, a congressional subpoena seeks the President's personal records from a third party.

Regardless of the target, a congressional subpoena's validity always presents questions "of unusual importance and delicacy." *McGrain v. Daugherty*, 273 U.S. 135, 154 (1927). A court must determine whether the congressional demand serves a legitimate legislative purpose, which generally requires that it could result in valid legislation; whether the information sought is pertinent to the legitimate purpose; and whether Congress's need for the information outweighs any constitutional interests of the individual resisting the inquiry. *See, e.g.*, *Watkins v. United States*, 354 U.S. 178 (1957).

Those questions become more complex and sensitive when Congress targets the President. A congressional demand for the President's personal records raises the specter that members of the Legislative Branch are impermissibly attempting to interfere with or harass the Head of the Executive Branch, or at least that the subpoena will have that effect, especially given the possibility of a multitude of such subpoenas. This risk requires a commensurately searching evaluation by the Judicial

Branch. Moreover, the question whether the investigation could result in valid legislation is substantially more freighted, because of the significant constitutional constraints on Congress's authority to regulate the President. Likewise, evaluating the pertinence of the information sought and determining whether the information is sufficiently important to Congress's investigation to justify the potential harm to the President are especially demanding inquiries.

Before a court confronts these serious questions, separation-of-powers concerns and constitutional-avoidance principles require that the House both (1) clearly authorize the demand for the President's information, and (2) clearly identify the legislative purpose for seeking such information, including by identifying with sufficient particularity the subject matter of potential legislation to which the information sought is pertinent and necessary. Where "the House of Representatives itself has never made" these "critical judgment[s]," courts should not be placed in the "impossible" situation of hypothesizing defenses for Congress against the President. *Cf. Watkins*, 354 U.S. at 206 (similar with respect to subpoena implicating First Amendment and Due Process rights); *Cheney*, 542 U.S. at 388 (where discovery raises separation-of-powers concerns, the party seeking information "bear[s] the onus" of establishing its need for the information with "sufficient specificity").

Here, although the House recently passed a resolution authorizing the subpoena, it did so only as part of a general authorization for pending and future investigations that does not manifest the required particularized determination

described above. The House has not yet identified the purpose for which it seeks the subpoenaed material with "sufficient particularity," *Watkins*, 354 U.S. at 201, to warrant this Court's adjudication of the serious constitutional issues this sweeping subpoena presents. Indeed, even the Committee memorandum—the only legislative attempt to justify the subpoena—provides at most a "mere semblance of legislative purpose." *Id.* at 198. The memorandum's generic assertion that the subpoenaed information will aid "review of multiple laws and legislative proposals," JA107, falls short of the needed specificity. And while the memorandum identifies four topics the Committee is investigating, that list objectively tends to reinforce rather than dispel questions about the subpoena's legitimacy and sweeping scope (financial records extending back to 2011). Far from curing these deficiencies, the House's recent blank-check authorization of all existing *and future* subpoenas concerning the President underscores the need for this Court to require the House itself to provide a clear explanation of the purpose of this specific subpoena. At an absolute minimum, the House Committee on Oversight and Reform must do so.

ARGUMENT

I. THE HOUSE MUST CLEARLY AUTHORIZE A SUBPOENA DIRECTED AT THE PRESIDENT AND THE LEGISLATIVE PURPOSE FOR WHICH THE INFORMATION IS SOUGHT MUST BE SPECIFIED WITH SUFFICIENT PARTICULARITY

A. The President's Unique Status Requires Special Solicitude From Congress And Courts

1. "The President occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). While the Constitution vests the legislative and judicial powers in collective bodies, "the executive Power" is vested in the President alone. *Id.* at 749-50. His office, unlike those of other executive officers, is not dependent on Congress for its existence or powers. The Constitution itself "entrust[s] [the President] with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 750. And it is he alone "who is charged constitutionally to 'take Care that the Laws be faithfully executed.'" *Id.*

Due to the "special nature of the President's constitutional office and functions" and "the singular importance of [his] duties," separation-of-powers principles require particular "deference and restraint" in the conduct of litigation involving the President. *Fitzgerald*, 457 U.S. at 751-56. The Supreme Court and this Court, for example, have refused to infer that Congress intends an ambiguous or silent statute to apply to the President and have instead demanded a clear statement from Congress. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). Separation-of-powers concerns likewise led

the Supreme Court to hold that the President is absolutely immune from civil damages liability for his official actions, *Fitzgerald*, 457 U.S. at 756, and that he is entitled to special solicitude in discovery, *Cheney*, 542 U.S. at 385, even in suits solely related to his private conduct, *Clinton v. Jones*, 520 U.S. 681, 707 (1997) ("The high respect that is owed to the office of the Chief Executive … is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery."). Separation-of-powers concerns also must inform a court's assessment of the President's entitlement to judicial review and relief. *Cheney*, 542 U.S. at 385 (concerning mandamus relief from discovery order); *In re Trump*, No. 19-5196, 2019 WL 3285234, at * 1 (D.C. Cir. July 19, 2019) (concerning certification of interlocutory appeal).

Separation-of-powers concerns are especially acute when litigation involves a congressional demand for the President's information. *See United States v. AT&T*, 551 F.2d 384, 390, 394 (D.C. Cir. 1976) ("nerve-center constitutional questions" arise when "there is a conflict between the legislative and executive branches over a congressional subpoena"). Such demands pose the threat that the Legislature may "aggrandize itself at the expense" of the Executive by usurping law-enforcement functions, *Bowsher v. Synar*, 478 U.S. 714, 727 (1996), or may "impair [the Executive] in the performance of its constitutional duties" through burdensome inquiries, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 500 (2010). *See Watkins*, 354 U.S. at 187, 200 (legislators might improperly use their investigative powers "for the[ir] personal

aggrandizement," to "punish those investigated", or "to expose for the sake of exposure"); *In re Trump*, 928 F.3d 360, 368 (4th Cir. 2019) (congressional investigation into the President's personal financial affairs "could result in an unnecessary intrusion into the duties and affairs of a sitting President").

Even if Congress does not intend its subpoenas to burden the President, there is a serious risk they will, especially where there are myriad simultaneous inquiries. Unlike investigations in criminal and civil proceedings, which are confined to discrete controversies and subject to various protective measures, congressional committees may issue successive subpoenas in waves, making far-reaching demands that harry the President and distract his attention. *See United States v. Rumely*, 345 U.S. 41, 46 (1953) (because the process of initiating a legislative investigation is typically far "more casual[] and less responsibl[e]" than that of enacting legislation, the prospect of constitutional difficulties is greater).

2. These constitutional concerns are not ameliorated by the fact that the Committee's subpoena is nominally directed at the President's accountant. The President, not Mazars, is the target of the subpoena, and the Oversight Committee seeks the President's personal records solely on account of the public office he holds. *See* JA107; Committee Br. 9, 10, 12. The subpoena therefore raises the same kinds of separation-of-powers concerns that a subpoena seeking the information directly from the President would raise.

Judicial Watch, Inc. v. Secret Service, 726 F.3d 208 (D.C. Cir. 2013), is instructive. That case rejected a FOIA request seeking White House visitor logs maintained by the Secret Service. *Id.* at 214. This Court emphasized that FOIA could not be used "to compel the President or his advisors to disclose their own appointment calendars [directly]," consistent with the "serious separation-of-powers concerns that would be raised by a statute mandating disclosure of the President's daily activities." *Id.* at 216. This Court then recognized that requiring the Secret Service to disclose its logs would "effectively" provide the plaintiff with access to records it could not have sought from the President directly. *Id.* at 225. This Court rejected the plaintiff's "end run" raising the same separation-of-powers problems that a direct request would provoke. *Id.*

That reasoning applies here. The President must rely on expert third parties to oversee, manage, and report on his financial holdings. Accordingly, this subpoena is in practical effect no different from one served on the President. Although the President is relieved of the physical burden of complying with the subpoena, he would not personally compile the requested documents even if he were the subpoena's recipient. The subpoena thus should be treated for separation-of-powers purposes as if it were directed to the President. *See In re Trump*, 2019 WL 3285234, at *1 (recognizing that third-party discovery requests by Members of Congress concerning President's alleged receipt of emoluments raised separation-of-powers concerns). Treating the Committee's subpoena as if it were a run-of-the-mill subpoena served on a private party is particularly inappropriate because that would not entail protections

parallel to the constitutionally mandated negotiation-and-accommodation process that applies to a congressional request for the President's records related to his public office. *See United States v. AT&T*, 567 F.2d 121, 130 (D.C. Cir. 1977).

B. Separation-Of-Powers And Constitutional-Avoidance Considerations Mandate That The Committee's Subpoena Be Clearly Authorized And Justified With Sufficient Particularity

1. Even when a congressional subpoena does not target the President, a court's evaluation of the subpoena's validity presents constitutional questions "of unusual importance and delicacy." *McGrain*, 273 U.S. at 154. Because "[e]xperience admonishes [courts] to tread warily in this domain," courts have refused to uphold legislative inquiries that lack clear authorization by Congress and raise difficult constitutional questions. *See Rumely*, 345 U.S. at 46; *Tobin v. United States*, 306 F.2d 270, 276 (D.C. Cir. 1962). Whenever a court must draw "constitutional limits upon [Congress's] investigative power," it "ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." *Rumely*, 345 U.S. at 46.

Because the President is the subject of the Committee's inquiries, these principles apply with even greater force. The constitutional questions are more complex and delicate, and the potential for interference with the constitutional scheme is greater. Thus, just as the possibility that a congressional inquiry might violate the First Amendment requires that the full House or Senate clearly authorize

the inquiry, *Rumely*, 345 U.S. at 46-47, the possibility that a subpoena might interfere with the President (either on its own or when combined with other such subpoenas) mandates that Congress clearly authorize a subpoena directed at his records. *See Armstrong*, 924 F.2d at 289 ("[T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in decision."); *Franklin*, 505 U.S. at 800-01 (clear statement required "[o]ut of respect for the separation of powers and the unique constitutional position of the President").

2. The special solicitude that courts and Congress owe the Head of the Executive Branch, and the particular separation-of-powers issues that arise when Congress attempts to compel the President to produce information, also mandate that the House itself clearly identify a legitimate legislative purpose for seeking information from the President, with sufficient particularity that courts can concretely review the validity of any potential legislation and whether the information requested is pertinent and necessary to Congress's consideration of such legislation. At the very least, the relevant committee must provide the requisite specificity.

Congress's investigative authority is "subject to recognized limitations." *Quinn v. United States*, 349 U.S. 155, 161 (1955). The "legislative Powers herein granted" by Article I do not include any express authority to conduct investigations or issue compulsory process. The Constitution grants Congress subpoena power only insofar as the exercise of that "auxiliary power[]" is "necessary and appropriate to make

[Congress's] express powers effective." *McGrain*, 273 U.S. at 173; *see also Watkins*, 354 U.S. at 197 (Congressional investigations are "justified solely as an adjunct to the legislative process.").

Evaluating whether a subpoena is sufficiently "related to, and in furtherance of, a legitimate task of the Congress," *Watkins*, 354 U.S. at 187, requires a court to engage in a multi-step inquiry. The court must first determine whether the subpoena serves a "valid legislative purpose." *Quinn*, 349 U.S. at 161. Congress may not issue a subpoena for purposes of "law enforcement," as "those powers are assigned under our Constitution to the Executive and the Judiciary." *Id.* Likewise, setting aside the narrow circumstances in which Congress is expressly authorized to act other than through legislation, Congress "exceed[s] the limits of its own authority" where "the subject matter of the inquiry is "one in respect to which no *valid* legislation could be enacted." *Watkins*, 354 U.S. at 194 (emphasis added); *Quinn*, 349 U.S. at 161 (an inquiry is not valid if it concerns "an area in which Congress is forbidden to legislate"); *Tobin*, 306 F.2d at 272-73, 276 (subpoena's validity depends on validity of potential legislation it furthers).

The court also must decide whether the information sought is "pertinent" to the legitimate legislative purpose. *McGrain*, 273 U.S. at 176; *McPhaul v. United States*, 364 U.S. 372, 381-82 (1960) (information must be "reasonably relevant" to legitimate subject of investigation). There is "a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority." *Watkins*, 354 U.S. at

206. Finally, if necessary, the court must balance Congress's interest in the information against any constitutional interests of the party withholding it. *See id.* at 198-99 (addressing "the weight to be ascribed to" Congress's interest in disclosures and whether that interest "overbalances" countervailing rights).

This analysis becomes even more complex and delicate when Congress directs a subpoena at the President. To begin, the constitutional validity of any potential legislation raises more serious questions. The President is not like federal agencies or private parties, all of whom are plainly subject to myriad forms of regulation within Congress's legislative sphere. *See, e.g.*, *McGrain*, 273 U.S. at 178; *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 506 (1975). The Constitution establishes the President's office and vests "[t]he executive Power" in him, Art. II, § 1, cl. 1, and Congress's power to enact legislation that is "necessary and proper for carrying into Execution" the powers vested in the federal government, Art. I, § 8, cl. 18, does not allow it to curtail his constitutional prerogatives. Legislation regulating the President thus would bear the significant risk that it would unconstitutionally "impair [the President] in the performance of [his] constitutional duties." *Free Enter. Fund*, 561 U.S. at 493, 500. Because a court's assessment of the constitutionality of such possible enactments is necessarily more sensitive, there is a correspondingly greater need for specificity about the contours of any such legislation.

Courts also must conduct a more searching review of pertinence and necessity when Congress seeks information from the President. As in related contexts,

subpoenas that are "overly broad" and seek information that is not "demonstrably critical" should be deemed invalid when directed at the President's records on account of his office. *See Cheney*, 542 U.S. at 386-87; *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974). That conclusion reflects both the high respect owed the President, and the particular risk of unconstitutional aggrandizement or interference posed by one or more congressional subpoenas targeting the President, *see supra* pp. 5-6. The more penetrating inquiry required under such circumstances thus likewise demands a clear, specific statement from Congress of the legislative purpose that it believes justifies its subpoena.

Unlike in situations where "the particular subject matter" of an otherwise vague congressional inquiry makes manifest that the "real object" of the inquiry is valid legislation, *McGrain*, 273 U.S. at 178, a sweeping request for the President's records does not. There are acute concerns presented when analyzing the constitutionality of hypothetical legislation concerning the President, *see supra* p. 11, and this compounds the risk of improper "retroactive rationalization," *Watkins*, 354 U.S. at 204; *accord Tobin*, 306 F.2d at 274 n.7. And when Congress initiates a confrontation with the President, the ordinary presumption of validity afforded a coordinate branch's actions does not apply. *See Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia J., dissenting) (where the "political branches are . . . in disagreement, neither can be presumed correct").

Indeed, the Supreme Court demanded just such a clear statement of purpose when confronted with a Due Process and First Amendment challenge to a contempt conviction arising out of a congressional investigation. *See Watkins*, 354 U.S. at 206. The petitioner in *Watkins* refused to answer questions about suspected members of the Communist Party. *Id.* at 186. In evaluating the validity of the committee's inquiry, the Court emphasized that the petitioner raised serious questions regarding whether the inquiry was "in furtherance of … a legitimate task of the Congress." *Id.* at 187. In particular, the Court emphasized that the resolution authorizing the committee's inquiries was so "[b]roadly drafted," and the committee's jurisdiction so "nebulous," that it was "impossible" for the Court to determine whether the inquiry furthered a legitimate legislative purpose and was important to that purpose, or whether the committee improperly sought "to gather data that is neither desired by the Congress nor useful to it." *Id.* at 205. Particularly in light of the "[p]rotected freedoms" that the committee's inquiry endangered, the Court demanded that the House justify the inquiry by "spell[ing] out [the committee's] jurisdiction and purpose" with "sufficient particularity" to allow the witness responding to the inquiry, and a reviewing court, to determine whether "any legislative purpose justifies the [information request] and, if so, the importance of that information to the Congress in furtherance of its legislative function." *Id.* at 201, 206; *see also id.* at 214-15 (the House must describe "what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.").

The separation-of-powers concerns arising from the President's unique status likewise demand that the House (or at least the Committee) clearly identify a legitimate legislative purpose for seeking the President's official or private records, including identifying with sufficient particularity the subject matter of potential legislation to which the information sought pertains.

3. Principles of constitutional avoidance reinforce this conclusion. Even when the President is not involved, courts have invalidated congressional subpoenas on threshold grounds to avoid confronting difficult constitutional questions. *See Rumely*, 345 U.S. at 45-46; *Tobin*, 306 F.2d at 275-77. Application of constitutional-avoidance principles is even more appropriate in a dispute with the President. *See Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989).

The district court suggested (JA289-90) that this Court need not confront any constitutional questions about the subpoena's pertinence and necessity to valid legislation because Congress has an independent "informing function" to educate the public about government operations. *See Watkins*, 354 U.S. at 200 & n.33. But "disseminat[ing] to the public beyond 'the legitimate legislative needs of Congress'" is not encompassed within Congress's "legislative activity," *McSurely v. McClellan*, 553 F.2d 1277, 1285-86 (D.C. Cir. 1976) (en banc), and at the very least, that too presents a serious constitutional question that this Court should not address unless clearly invoked. "[T]here is no congressional power to expose for the sake of exposure," *Watkins*, 354 U.S. at 200, and the absence of any such express legislative power holds

true with respect to government officials and agencies. Any implied power to use congressional subpoenas to expose government wrongdoing must still be necessary and proper to carry into execution some expressly granted power—ordinarily, Congress's power to enact valid legislation. *See Huchinson v. Proxmire*, 443 U.S. 111, 132-33 (1979).[1]

II. NEITHER THE HOUSE ITSELF NOR EVEN THE COMMITTEE HAS CLEARLY STATED THE LEGISLATIVE JUSTIFICATION FOR THE SUBPOENA WITH SUFFICIENT PARTICULARITY

A. Until two weeks ago, the House had not provided a clear statement authorizing the Committee's subpoena. The House Rules the Committee invoked (*see* Br. 36-38) do not mention the President specifically, and while some laws within the Committee's jurisdiction refer to the President along with other officials, that does not "demonstrate with unmistakable clarity" that the House authorized the Committee to subpoena the President in particular. *See Dellmuth v. Muth*, 491 U.S. 223, 231 (1989).

Following oral argument, the House passed a resolution retroactively authorizing the subpoena. H.R. Res. 507 (July 23, 2019). Notably, the resolution authorizes not only this subpoena, but *all* "current and future" subpoenas by any

[1] The House's impeachment power is an express authority whose exercise does not require a connection to valid legislation. But the Committee has asserted neither jurisdiction over, nor an objective of pursuing, impeachment, and its counsel expressly disavowed that end. Tr. 99 (Dkt. 33). That interest thus cannot justify this subpoena. *Tobin*, 306 F.2d at 274 n.7.

committee issued "directly or indirectly" to the President "in his personal or official capacity," his family, or his businesses, among others. *Id.* at 2, 3. It does not articulate the legislative purposes to be served by any of these subpoenas, and it does not require committees to do so.

While the resolution clearly authorizes the Committee's subpoena, the resolution's authorization of all existing *and future* investigations and subpoenas reinforces the need for a clear statement of a valid legislative purpose to justify the specific subpoena and investigation concerning the President. The House's blank-check resolution for all committees to investigate the President directly and indirectly without any guidance or limitation on their investigative authority is a substantial departure from "procedures which prevent the separation of power from responsibility." *Watkins*, 354 U.S. at 215. Such a failure by the House to exercise "preliminary control of the Committee" (*id.* at 203) would be remarkable and troubling even for a subpoena to a private party or federal agency, but it is manifestly improper as to the President, given "the high respect that is owed to [his] office," which "should inform the conduct of the entire proceeding" in Congress as in the courts. *Cheney*, 542 U.S. at 385.

The House's lack of responsibility is sufficient reason for this Court to declare this subpoena invalid. Otherwise, the resolution's carte-blanche approval of all future subpoenas directed toward the President would vastly increase the risk that this Court will be confronted with difficult litigation about the validity of sweeping subpoenas

purportedly justified by vague incantations of hypothetical legislative purposes. At an absolute minimum, this Court should require the Committee to provide the necessary clarity, which it likewise has failed to do.

B. The primary source to glean the objective of this subpoena is the Committee Chairman's April memorandum. *See* JA104-07. The memorandum was not ratified by the full House and is thus insufficient. Regardless, it too falls well short of providing the necessary level of clarity and particularity. While references to precise legislative proposals may not be required in some circumstances, the memorandum's boilerplate reference to "multiple laws and legislative proposals" (JA107) is far too vague in these circumstances to support an assessment of whether this subpoena is sufficiently "related to, and in furtherance of, a legitimate task of the Congress." *Watkins*, 354 U.S. at 187.

This case highlights the difficulties that arise when the House fails to state with sufficient particularity the investigatory objectives and potential legislation for which the subpoenaed materials concerning the President are purportedly needed. The Chairman's memorandum identifies four issues that the Committee is investigating. JA107. On its face, that list provides "strong reason to doubt," *Watkins*, 354 U.S. at 213, that the subpoena's "real object" was legitimate in light of "the particular subject-matter," *McGrain*, 273 U.S. at 178. Law enforcement is an impermissible objective, *Quinn*, 349 U.S. at 161, and the list and subpoena, which bear some of the hallmarks

of such an investigation, fail to clearly establish a permissible objective in investigating the President.

As this Court has explained in the context of another Presidential subpoena, "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability[] than on precise reconstruction of past events." *Senate Select Comm.*, 498 F.2d at 732. It is instead law enforcement officers and juries that must reconstruct a precise picture of the facts to determine whether "certain named individuals did or did not commit specific crimes." *Id.* Yet the memorandum strongly suggests that the Committee is attempting to reconstruct past events and determine whether the President "did or did not commit specific crimes." *Id.* at 732. The memorandum states explicitly that the Committee is investigating "whether the President may have engaged in illegal conduct before and during his tenure in office." JA107. It further indicates that the Committee is attempting to determine whether the President has violated the Constitution's Emoluments Clauses, and whether he violated federal reporting statutes. JA107. The memorandum also confirms that the Committee's investigation arose out of allegations that the President fraudulently "altered the estimated value of his assets and liabilities on financial statements" long before he was a Presidential candidate, JA104, another indication that the Committee is investigating past violations of the law by a specific individual. That the subpoena seeks eight years of financial records, including years before the President's term began, reinforces the conclusion that its

interest is focused on the reconstruction of past events, not necessarily on "the predicted consequences of proposed legislative actions." *Senate Select Comm.*, 498 F.2d at 732.

To be sure, Congress is not disabled from inquiring into past events merely because germane inquiries concerning potential legislation may reveal violations of the law. But especially where the President is involved, if the available evidence provides "reason to doubt" that the legislative purpose advanced in court is the objective purpose supporting a particular inquiry, a court cannot assume that Congress's inquiry into unlawful conduct was merely incidental. *See Watkins*, 354 U.S. at 212-14 (declining to accept at face value a Subcommittee's statement that its inquiries were about "Communist infiltration in labor," where the Subcommittee's conduct indicated that "the subject before the Subcommittee was not defined in terms of Communism in labor").

Moreover, the avowed subjects of the Committee's investigation are not so "plainly" matters on which valid legislation could be had that any "presumption" of legitimacy would be applicable, *McGrain*, 273 U.S. at 177-78, even apart from its inappropriateness in this context, *see supra* pp. 12. For example, the Committee's declared interest in the President's potential "conflicts of interest," JA107, is inadequate. Congress cannot impose qualifications for the office of the President beyond those established in the Constitution. *Cf. Powell v. McCormack*, 395 U.S. 486, 550 (1969). Nor can it "impair [the President] in the performance of constitutional

duties." *Free Enter. Fund*, 561 U.S. at 493, 500. It thus would be unconstitutional for Congress to enact legislation that either disabled persons with conflicts of interest from serving as President (thereby establishing an additional qualification) or required the President to recuse himself if he has a conflicting interest (thereby leaving responsibility for the execution of the law to others). Ltr. From Acting Atty Gen Silberman to Chairman Cannon (Sept. 20, 1974). And even if Congress crafted some other law more indirectly addressing Presidential conflicts of interest, such legislation would at a minimum raise substantial separation-of-powers questions; it is not this Court's role to speculate about hypothetical legislation that the Committee has not identified and then attempt to determine whether the Committee's sweeping subpoena is sufficiently tailored to that hypothetical objective.

The Committee's stated interest in the President's "compl[iance] with the Emoluments Clauses of the Constitution," JA107, likewise lacks a sufficiently clear connection to constitutionally permissible action. Although Congress has the authority to consent to foreign emoluments, the memorandum does not suggest that the Committee is investigating the President with a view toward consenting to any undisclosed emoluments. The Committee's stated interest in trying to uncover possible "illegal conduct" and ethical lapses renders implausible any suggestion that the Committee is looking to validate the President's actions. And again, even if there were some other emoluments-related legislation that Congress might craft, this Court should not be placed in the position of divining what that legislation might be,

whether it would be valid, and if the Committee's subpoena would be appropriately tailored to address it.

Relatedly, without specific guidance from the House on the particular areas in which it contemplates possible legislation, this Court cannot adequately evaluate whether the subpoenaed information is "pertinent" and of "material[] ai[d]." *McGrain*, 273 U.S. at 176-77. If, for example, the central purpose of the Committee's investigation were to aid the House in drafting legislation aimed at more "accurate[] report[ing of the President's] finances," JA107, it is not apparent why detailed information about the President's finances from years before he became even a Presidential candidate would be reasonably relevant and necessary to such an investigation. *See Watkins*, 354 U.S. at 206.

The Committee's legal briefs cannot cure the failure of the Committee, much less the House itself, to sufficiently describe the purposes underlying the subpoena. This Court must evaluate the reasons "in fact" given for issuing the subpoena, not reasons that "*might* have" been given. *Tobin*, 306 F.2d at 274 n.7. Allowing the House to rely on its lawyers' "retroactive rationalization[s]" would only further widen the "gulf between the responsibility for the use of investigative power and the actual exercise of that power." *Watkins*, 354 U.S. at 204-05. It is thus irrelevant that the Committee's briefing identifies (Br. 18-19, 32-33) specific legislation that the requested information purportedly might aid.

In any event, that scattershot collection of legislative proposals only underscores why a clearer and more particular statement of legislative purpose is necessary here. The brief relies primarily on H.R. 1. But the House has already passed that bill and was able to do so without the information the subpoena now seeks. Moreover, the constitutionality of H.R. 1's most relevant provisions concerning the President—including its requirement that he "divest … all financial interests that pose a conflict of interest," H.R. 1, §§ 8012, 8013—raise substantial constitutional questions. It is also entirely unclear why the vast array of financial records the Committee's subpoena requests would be material to Congress's consideration of H.R. 1. Before this Court undertakes the challenging and controversial task of evaluating whether these measures justify the Committee's subpoena targeting the President, it is imperative that the House—or at the very least the Committee—provide a clearer and more particular statement of the potential legislative measures for which the subpoenaed materials are pertinent and necessary.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit imposed by this Court's July 15, 2019 Order because it contains 5,196 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Gerard Sinzdak
Gerard Sinzdak

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system and delivered paper copies to the Court. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Gerard Sinzdak
Gerard Sinzdak